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No. 90-1727

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1990

WESTVACO COMPANY, RICHARD LAFFARGUE
AND LORENZO SANCHEZ,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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Labor Management Relations Act,
§ 301, 29 U.S.C. § 185 passim

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PETITIONERS,

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DOLORES SWEENEY,
RESPONDENT.

I. THE ISSUE SOUGHT TO BE REVIEWED IS PRESENTED CLEARLY AND UNEQUIVOCALLY.

Respondent argues that this case is not worthy of certiorari because it "does not present the issue sought to be reviewed in the clear and unequivocal manner necessary for certiorari review." Resp. Brief in Opp. to Pet. for

Cert. at 27.[1] It requires only the briefest review of the decisions below to demonstrate that respondent's argument is wrong.

The single issue presented to this Court by the Petition is the question whether a preemption claim arising under § 301 of the Labor Management Relations Act is waivable. The District Court below specifically ruled that "normal rules of preservation do not apply," and thus concluded that a claim of § 301 preemption could not be waived. App. B. to Petn. at 17b-19b (emphasis in original). The District Court then went on to hold that the plaintiff's state law tort claim was preempted by § 301. Id. at 19b-47b. The Court of Appeals reversed on the waiver issue, holding that petitioners had waived the § 301

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[1] Hereinafter, citations to the Petition for Writ of Certiorari will appear as "Petn." followed by the page number. Citations to Respondent's Brief in Opposition to Petition for Certiorari will appear as "Resp." followed by the page number.

preemption defense by failing to assert it before the end of the trial. App. A to Petn. at 23a. In light of this ruling, the Court of Appeals decided that it did not need to address the issue of whether the tort claim was preempted.

Respondent seems to argue that the Court of Appeals' failure to address the § 301 preemption issue somehow prevents this Court from properly addressing the waiver issue. The waiver issue is the only issue that petitioners have brought before this Court. It is the only issue that has been adjudicated by both the District Court and the Court of Appeals. Respondent's assertion that this issue is "precariously presented," Resp. at 30, is incomprehensible.

II. THERE ARE NO "ALTERNATIVE GROUNDS" FOR UPHOLDING THE RULING BELOW WHICH WOULD JUSTIFY DENIAL OF THE PETITION.

Respondent maintains that certiorari should not be granted because there are "alternative grounds for finding that the judgment below is correct." Resp. at 30. Respondent then proceeds to argue, in effect, that assuming petitioners' § 301 preemption defense was not waivable, nonetheless respondent's tort claim was not preempted by § 301. Respondent's arguments were specifically rejected by the District Court. App. B to Petn. at 19b-47b. Although the Court of Appeals did not need to reach these arguments, it nevertheless acknowledged that under the principles set forth by this Court in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), courts of appeals "have held that tort actions similar to this one are pre-empted under § 301(a)." App. A to Petn. at 22a.

The issue presented by the petitioner is of national significance. It will determine the priority of the policies supporting the uniform application of collective bargaining agreements and arbitration, as against state tort claims based on workplace conduct that is governed by collective bargaining agreements. This squarely presented threshold issue cannot appropriately be avoided by considering, without extensive briefing and argument, substantive issues which were not reached by the Court of Appeals.

In any event, respondent is wrong in contending that preemption does not properly apply in this case.

A. The Underlying Claim for Negligent Infliction of Emotional Distress Requires an Interpretation of the Collective Bargaining Agreement and Is Therefore Preempted.

Respondent asserts that the Court of Appeals "found" that George Sweeney was "'harassed, taunted and humiliated' [and] that the defendants' behavior was of

'unusual callousness or cruelty.'" She argues that such behavior "cannot reasonably be within the rights of an employer under any contract." Resp. at 32. Thus, she argues, § 301 preemption does not apply to this case because interpretation of the contract was not in dispute. Resp. at 33.

But respondent's assertions are misleading. The Court of Appeals stated only that the jury might have found such behavior. App. A to Petn. at 6a. In fact, the jury returned a verdict of negligent infliction of emotional distress, and specifically rejected plaintiff's claim of intentional infliction, App. B to Petn. at 12b, thus indicating that, contrary to respondent's characterization, defendants' behavior was not "outrageous" and not beyond

any possible contractual rights of an employer.[2] As the District Court observed:

> The very first element of the plaintiff's cause of action, negligence, necessarily requires scrutiny of the reasonableness of defendants' conduct under the circumstances. As the First Circuit noted in the Jackson case [Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988)], assessment of the reasonableness of an employer's actions in the workplace almost inevitably demands some interpretation of the applicable rules of that workplace.

App. A. to Petn. at 42b. The tort claim in this case cannot survive preemption because the reasonableness of defendants' allegedly negligent conduct cannot be evaluated

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[2] In Massachusetts, outrageous conduct is an element of the tort of intentional infliction of emotional distress, which the jury here rejected, but it is not an element of negligent infliction. Payton v. Abbott Labs, 386 Mass. 540, 437 N.E. 2d 171 (1982). In a case of negligent infliction, the issue is whether the defendant's conduct was reasonable. Id.

except by reference to -- and construction of -- the terms of the collective bargaining agreement.

Because the only tort found by the jury was negligent infliction of emotional distress, respondent's reliance upon Keehr v. Consolidated Freightways of Delaware, Inc., 825 F. 2d 133 (7th Cir. 1987), Paradis v. United Technologies, Pratt & Whitney Div., 672 F. Supp. 67 (D. Conn. 1987), and Alpha Beta, Inc. v. Superior Court, 244 Cal. Rptr. 414 (Cal. App. 1st Dist.), cert. denied, 488 U.S. 956 (1988), is misplaced. Each of those cases dealt specifically with intentional infliction of emotional distress. Each court found the behavior of the defendants so outrageous as not to require reference to the collective bargaining agreement. Here, by contrast, the District Court found that the acts complained of could "only be viewed through the lens of the collective bargaining agreement." App. B to Petn. at 43b.

Even claims of intentional infliction of emotional distress have been held to be preempted by § 301 where they cannot be decided without reference to the collective bargaining agreement. See, e.g., Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989). The Douglas Court observed that "the parties' contractual obligations regarding the terms and conditions of the employment relationship need not be reduced to the words 'expressly recited in the agreement.'" Id. at 572 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 214 (1985)). It noted the possibility, suggested in Allis-Chalmers, that the collective bargaining agreement created implied rights which might govern the alleged misconduct. Id. at 573.

In Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 118 (1st Cir. 1988), cert. denied, 498 U.S. 1107 (1989), the court stated, in reviewing plaintiff's invasion of privacy

suit against his employer, ". . . [r]easonableness almost always requires investigation of the terms of the collective bargaining agreement." See also Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985); Newberry v. Pacific Racing Ass'n., 854 F.2d 1142, 1149-50 (9th Cir. 1988); Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1988); Harris v. Alumax Mill Products, Inc., 897 F.2d 400 (9th Cir.), cert. denied, 111 S.Ct 102 (1990); Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990).

In the present case, it is equally clear that the defendants' conduct could be evaluated only by reference to the terms of the collective bargaining agreement. As the District Court observed:

> [T]he actions complained of by the plaintiff were submerged, at the time the actions were taken, in the complex of interrelationships in the workplace environment. The initial warning, for example, was issued pursuant to specific

> written guidelines. The significance of the alleged bad faith refusal to accept the medical certificate implicates the rules of the workplace. The conduct of the safety engineer, the supervisors' demands for greater speed and the plaintiff's husband's eventual demotion and transfer can only be viewed through the lens of the collective bargaining agreement.

App. B to Petn. at 42b-43b.

B. The Policies Underlying the § 301 Preemption Doctrine Require That Plaintiff's Loss of Consortium Claim Be Preempted.

Allowing Mrs. Sweeney's consortium claim to go forward while her husband's claim is preempted, on the theory that her claim is somehow "independent," or because she is not a party to the collective bargaining agreement, Resp. at 34-39, would circumvent the principle of uniform labor policy so clearly articulated in Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962), Allis-Chalmers, supra, and Lingle, supra. In order for Mrs. Sweeney to succeed on her loss of consortium claim, she

must establish that the defendants negligently inflicted emotional distress upon her husband. The negligent infliction claim necessarily requires an evaluation of the reasonableness of defendants' conduct and is, as shown above, inextricably intertwined with the interpretation of the collective bargaining agreement. Permitting plaintiff's loss of consortium claim to proceed on the theory that it is "independent" under state law would allow plaintiff to claim as tortious the same conduct toward her husband that an arbitrator could determine to be reasonable and proper under the collective bargaining agreement.

If the federal labor policies underlying the § 301 preemption doctrine are to be given full force and effect, loss of consortium claims by family members of employees that depend on proof of the reasonableness of conduct in the workplace must be governed by the same preemption standards that apply to claims by the employees themselves.

The spouse's claim for loss of consortium necessarily will depend on proof of the underlying tort claim of the injured employee. If that underlying tort claim requires consideration of the applicable collective bargaining agreement, the potential for state law interference with federal labor policy is the same in the loss of consortium case as it would be in a direct claim by the injured employee.[3] Were the rule otherwise, the preemptive effect of § 301, and the "interests in interpretive uniformity and predictability that require that labor contract disputes be resolved by reference to federal law," Allis-Chalmers, supra, 471 U.S. at 211, could routinely be evaded by suits filed by employees' relatives.

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[3] In fact, the potential for disruption is even greater, for it raises the specter of a single agreement having different meanings or consequences not only across state lines, but within the same state with regard to different members of the same household.

It is not surprising that the case law supports this view. In Johnson v. Anheuser-Busch, Inc., 876 F.2d 620 (8th Cir. 1989), the Court of Appeals for the Eighth Circuit held preempted under § 301 a loss of consortium claim that was dependent for its proof upon an underlying claim that required the interpretation of the labor contract. Id. at 624. The Johnson court, relying upon Allis-Chalmers, supra, concluded that to the extent that the wife's loss of consortium claim relied upon an underlying claim that was preempted under § 301, her loss of consortium claim was also preempted. Id. at 625. Under Johnson, a loss of consortium claim is subject to the same test under Allis-Chalmers as the underlying claim. Cf. Sluder v. United Mine Workers, 892 F.2d 549 (7th Cir. 1989), cert. denied, 111 S.Ct. 45 (1990). District Court cases have similarly acknowledged that spousal consortium claims cannot proceed to determination under state law

where they depend on the interpretation of a collective bargaining agreement. See, e.g., Ward v. Savannah Maritime Ass'n, 129 L.R.R.M. (BNA) 3061 (S.D. Ga. 1988); Sherwin v. Indianapolis Colts, Inc., 752 F. Supp. 1172 (N.D.N.Y. 1990).

Respondent's argument, based upon Adkins v. General Motors Corp., 556 F. Supp. 452 (S.D. Ohio 1983), that her "independent" loss of consortium claim may proceed notwithstanding § 301 because she would have no standing to sue under § 301, does not withstand scrutiny. As the District Court in the present case stated, Adkins "is simply not good law on this point." App. B to Petn. at 45b. Adkins predated this Court's decisions in Allis-Chalmers and Lingle. In holding that plaintiff's loss of consortium claim was not preempted, moreover, Adkins did not consider § 301 preemption, but only Garmon preemption. The court in Adkins did not consider whether

the loss of consortium claim required an interpretation of the labor-management contract.

Respondent also argues that § 301 should have no effect on her loss of consortium claim because it is "independent" of her husband's claim under Massachusetts law. Resp. at 34. This argument not only is based on the untenable premise that Massachusetts law should override federal labor policy, but it also misstates Massachusetts law on the loss of consortium. While the Massachusetts Supreme Judicial Court has described a loss of consortium claim as "independent" of the injured family member's claims for certain purposes, e.g., Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980), the Court has made clear that spousal consortium claims cannot go forward when the underlying tort claim is precluded. Thus, for example, in Corrigan v. General Electric Co., 406 Mass. 478, 548 N.E.2d 1238 (1985), the

Court held that a spouse's consortium claim was precluded by an adverse determination against her husband by the Industrial Accident Board, even though the spouse was not and could not be a participant in the IAB proceeding. See also Fidler v. E.M. Parker Company, Inc., 394 Mass. 534, 476 N.E.2d 595 (1985); Mouradian v. General Electric Co., 23 Mass. App. Ct. 538, 503 N.E. 2d 1318, rev. denied, 399 Mass. 1105, 507 N.E. 2d 1056 (1987) (wife's consortium claim dismissed where husband failed to state tort claim for wrongful discharge). These decisions undermine respondents' argument based on the "independence" of her consortium claim. Any such argument must, in any event, bow to the overriding force of federal labor law.

CONCLUSION

The single issue presented to this Court for review - whether a § 301 preemption claim is waivable - is clearly

and unambiguously presented by this case. Respondent's "alternative grounds" for upholding the judgment were squarely rejected by the District Court, were not reached by the Court of Appeals, and, in any event, involve legal arguments that are unlikely to succeed.

Respectfully submitted,

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